THE CITY OF SAN DIEGO

September 25, 2006

Hand Delivery

Mr. Benjamin Tobler
California Regional Water Quality Control Board
San Diego Region
9174 Sky Park Court, Suite 100
San Diego, California 92123

Subject: Comments on the Total Maximum Daily Loads for Dissolved Copper, Lead, and Zinc In Chollas Creek, Tributary to San Diego Bay

Dear Mr. Tobler:

Thank you for the opportunity to comment on the Chollas Creek Dissolved Metals Total Maximum Daily Load (TMDL) project. The City of San Diego is committed to improving regional water quality, including Chollas Creek, and will continue to work to implement the Chollas TMDL in the most environmentally-sensitive and fiscally prudent manner possible. The body of this letter contains the major points the City wishes to emphasize in its comments on this TMDL; accompanying this letter is also a list of individual, detailed comments.

## I. Flaws in the Proposed Compliance Schedule

The City's biggest concern regarding the Chollas Creek metals TMDL is with the proposed compliance schedule. The TMDL Technical Report states the following regarding discharger activities to achieve the WLAs:

> Dischargers are expected to implement metal reduction [Best Management Practices or "BMPs"] during the first year after OAL approval of this TMDL, with all necessary metal load reductions being achieved within ten years. The first three years of the compliance schedule do not require a significant decrease from current conditions. These years will provide the dischargers time to develop plans and implement enhanced and expanded BMPs that should result in immediate decreases of metal concentrations in the

> Chollas Creek water column. Three years are provided for these measures to begin to lower Chollas Creek metal concentrations before the first reduction is required.

This compliance schedule is inconsistent with sound planning, engineering and public policy considerations because: (1) it assumes that non-structural BMPs will achieve a high level of reductions; and (2) it requires the most difficult reductions – the last 50 percent of metal loadings – to be achieved in the last three years of the compliance schedule. The second point is the most critical. If – as contemplated by technical report's compliance schedule and as set forth in detail in staff's April 7, 2006 letter to the State Water Resources Control Board – dischargers deploy the non-structural BMPs first, then the full measure of reductions will be achieved once those BMPs are operational. Hence, the only reason compliance would not be achieved upon implementation of all non-structural BMPs is that those BMPs are not capable of achieving the wasteload allocations [WLAs] on their own. This is implicit in staff's proposed compliance schedule. Hence, the only way the compliance schedule in the Technical Report makes sense is if the dischargers will know sufficiently in advance of the 10-year compliance deadline where structural BMPs will be required such that they can be constructed, operating and achieving the required reductions by Year 10. Based on the City's detailed analysis discussed later, this is unrealistic.

The first critique of staff's proposed compliance schedule is not as intuitive. The available data suggests that non-structural BMPs will reduce pollutant loads between 30 percent and 70 percent. Staff's proposal appears to "shoot for the middle" and requires a 50 percent reduction in WLA exceedences by Year 7. The City believes that this is a little too simplistic. This TMDL targets the ***toxicity*** of ***dissolved*** metals. Compliance with this TMDL is, therefore, affected by two separate factors: (1) the volume of metals that enter both urban runoff and the receiving waters; and (2) the hardness of the urban runoff and receiving waters (which affects the ability of the metals to be absorbed by organisms and hence be toxic). As detailed in the Weston Report, the effectiveness of the available non-structural BMPs cannot be predicted because there is a dearth of data at the subwatershed level regarding Chollas Creek's water hardness and metal loadings. Thus, assuming that – on average – non-structural BMPs will achieve the median level of pollutant reductions is too simplistic to ***mandate*** that level of compliance.

In addition to these flaws inherent in the proposed compliance schedule, there are other extrinsic matters that affect the actual time needed to achieve the WLAs proposed in this TDML:

- *The TMDL uses a non-integrated, TMDL approach.* We recommend integrated watershed based TMDLs to allow for the development and implementation of more holistic, efficient programs to improve water quality.

- *The TMDL schedule does not allow for maximizing the use of non-capital and non-land intensive BMPs.* The TMDL fails to allow sufficient time for the City to

identify the most effective combinaton of BMPs and minimize dislocation of residents and businesses through an iterative approach to BMP implementation.

- *The TMDL does not provide adequate guidance for compliance.* Neither the technical report nor the CEQA analyses designate a design storm. Knowing the capacity required of a BMP is critical to designing facilities which will comply with the TMDL while minimizing acreage requirements and capital costs.

- *The TMDL requires the City to maintain dry weather flows.* This is contrary to Municipal Permit Discharge Prohibition B.2, requires the MS4 operators to "effectively prohibit" these human-generated, flows. The Regional Board should explain how it sees the requirement to maintain dry weather flow in an urbanized area is consistent with the discharge prohibition in the MS4 permit. The City believe that these requirements are inconsistent and is one reason why the conclusion that there will be less-than-significant impacts to biological resources is unsupported by substantial evidence.

- *Inappropriate application of the tributary rule.* The TMDL requires load reductions prior to discharge into any receiving water, including open concrete channels. Under this interpretation, the Regional Board would no longer provide an incentive to replace concrete channels with vegetation because the vegetation would not address the non-compliance of waters upstream of the revegetation site.

## II. Alternative Compliance Schedule

With these concerns in mind, the City proposes an alternative compliance schedule. As evidence of the City's commitment to improve water quality, the City has already retained a well-respected and experienced water quality consulting firm – Weston Solutions, Inc. – to evaluate the BMPs the City can implement to achieve the WLAs proposed in this TMDL. This consulting firm prepared a report (hereinafter referred to as "the Weston Report"), which the City submits with these comments, setting out the City's options for complying with this TMDL. The Weston Report concludes – consistent with the implication in the Technical Report – that it will be necessary to implement ***some*** treatment facilities to achieve compliance.[1] Based on Regional Board staff's claims that they are not required to analyze the environmental impacts associated with implementing structural BMPs, it is reasonable to conclude that Regional Board staff has not analyzed the planning and construction activities associated with implementing these BMPs. Again, this is reflected in the proposed compliance schedule that requires the last 50 percent of exceedence reductions to be achieved in Years 8 through 10, even though these pollutant reductions require the most resource-intensive

[1] Despite the opportunity in its April 6, 2006 submittal to the State Water Resources Control Board, the San Diego Regional Board, on the other hand, has ***never*** claimed that achieving the reductions necessary to achieve the water quality objectives of the TMDL can be achieved ***solely*** through non-structural BMPs. The City is unaware of data that would support a conclusion that the WQOs can be achieved with only non-structural BMPs.

BMPs. These types of BMPs require significant time to plan, conduct thorough environmental review, acquire land, let construction contracts, construct the treatment works, and then verify that the treatment works are operating as planned (i.e., achieving the required pollutant reductions) – a process the City will need to conduct ***for each treatment work that must be constructed.*** Moreover, this entire process requires adequate funding to be available for constructing new public works, or substantially altering the manner in which existing public works projects (e.g. pavement re-surfacing) are carried out. Based on the City's significant experience with public works projects, it is the opinion of the City of San Diego that accomplishing this in less than 10 years is an unrealistic expectation, short of making wild assumptions on the need for structural BMPs construction and undertaking a massive public works construction campaign that will displace significant numbers of residences and businesses, contrary to sound public policy.

In an effort to minimize the significant adverse impacts associated with such an outlandish compliance scenario, the City requests that the Regional Board consider an alternative compliance schedule to that proposed in the TMDL Technical Report. This alternative compliance schedule is graphically presented in the Weston Report as Figure ES-8 on page xxvi. While the waste-reducing activities employed under both plans are not fundamentally different – both maximize the use of non-structural source controls, such as education, product substitution, street sweeping, and low-impact treatment techniques such bioretenion and passive infiltration prior to implementing more land-intensive treatment trains – the critical difference is that the City's alternative presents a compliance schedule that is based on sound engineering, scientific, and public policy considerations. The foundation of this fundamental difference is that it is necessary to assess the effectiveness of non-structural BMPs with stakeholders before deploying land-intensive treatment trains, which allows the City to carefully implement these measures in a manner that will minimize the condemnation of private property.

As reflected in Figure ES-8 of the Weston Report, the City believes that it can deploy all Tier I BMPs within five years of OAL approval of this TMDL, and will have pilot data available on Tier II BMPs.[2] Based on existing data, the Tier I BMPs should achieve a 30 percent reduction in metal loading. Hence, the City proposes an interim compliance goal of a 30 percent reduction in metal loadings five years after OAL approval. After those BMPs are deployed, the City believes that there should be a one year evaluation period, where the City assesses the synergistic effect of all non-structural BMPs being implemented. During this initial six year period, the City would also use early monitoring data to site targeted structural BMPs, construct these projects, assess their effectiveness and use that data to develop a master plan for structural BMP deployment.

---

[2] The distinction between the various BMP tiers is the amount of capital investment required. Tier I BMPs are labor intensive, with limited amount of capital required. The Tier II BMPs require significant capital investment; some can also be implemented in existing rights-of-way. Tier III BMPs require land acquisition and development.

Once the data from targeted structural BMPs and the complete implementation of Tier I BMPs is collected, the City would begin the arduous task of planning, siting, designing, and constructing Tier II and III BMPs – where needed throughout the watershed – followed by monitoring to assess their effectiveness. Based on the City's extensive experience in constructing public works projects, it will take 14 years after the City has all the Tier I data to fully construct and implement the capital and land intensive Tier II and Tier III BMPs. Thus, the City proposes to fully meet the WLAs in Year 20. Despite a desire to show good faith efforts at compliance, because of the dearth of data and the lack of a critical planning point that lies between full deployment of Tier I BMPs and the implementation of Tier II and Tier III BMPs – the City is unable to fashion a logical interim compliance goal – or at least one that is expressed as a percentage reduction in pollutant loading or as a reduction in WLA exceedences – that lies between a 30 percent reduction in metal loadings in Year 5 and full attainment of the WLAs in Year 20. The City is currently evaluating the feasibility of non-numeric interim compliance goals and will provide that information to the Regional Board when it is fully developed, hopefully well in advance of the public hearing on this TMDL.[3]

## III. CEQA Comments

The City maintains its position that the CEQA analysis contained in the technical report is inadequate. The environmental analysis begins with a discussion of the standards that apply to the Basin Plan amendment. The document states that the Regional Board has specific obligations under the Public Resources Code because the TMDL establishes performance standards or treatment requirements, and sets out an abbreviated list of those specific requirements. *See* Technical Report at 85. The document goes on, however, to state that the Regional Board "method of analysis" is similar to "tiering" and "limited its analysis in this document to the broad environmental issues at the Basin Plan amendment "performance standard" adoption stage." The documents then goes on to opine that "the Regional Board is not required, at the Basin Plan amendment adoption stage, to evaluate environmental issues associated with specific projects to be undertaken later to comply with the performance standards." *Id.* The document contains no citation to legal authority for these propositions. This is because these contentions are incorrect statements of the law.

### A. The Regional Board Does Not Fully Comply With Public Resources Code Section 21159

Here, the Regional Board concedes that the provisions of Public Resources Code section 21159 apply. Having made that concession, the Regional Board does not have the option to ignore the other specific requirements of that section. Nevertheless, the Basin Plan

[3] The City notes that, as described in the Technical Report at page 74, that the MS4 permit can be issued with a combination of numeric and non-numeric WQBELs. It is possible that a non-numeric WQBEL could be proposed as an interim compliance goal between Year 5 and Year 20.

Amendment completely ignores the requirements of subdivision (c) of section 21159, which states:

> The environmental analysis ***shall*** take into account a reasonable range of environmental, economic, and technical factors, population and geographic areas, and ***specific sites***.

PUBLIC RESOURCES CODE § 21159(c)(emphasis added)

Looking at each category of analysis specified in Public Resources Code section 21159, subdivision (c), the Regional Board's analysis is deficient because it fails to consider any of these factors. Thus, the record clearly reflects that the analysis does not satisfy all of the statutory requirements of an environmental analysis under Public Resources Code section 21159.

The Regional Board has made two different contentions regarding the adequacy of the environmental analysis: (1) that treatment controls are not a reasonably foreseeable method of compliance; and (2) that the Regional Board is not required to do a site specific analysis. The first contention is not factually supported; the second is legally incorrect.

As respects treatment controls, the Regional Board ignores three critical facts in that regard:

- There is no evidence that compliance in all watersheds has been achieved in practice during both wet weather and dry weather conditions by using only non-structural controls;
- The Weston Report concludes, with supporting analysis, that treatment controls will be necessary;
- The Regional Board's April 7, 2006 letter to the State Water Resources Control Board implicitly concedes that treatment controls will be necessary because it states that the use of detention facilities is not a reasonably foreseeable means of compliance ***"to the extent suggested by the City."***

This later fact is particularly interesting. The April 7th letter states:

> Detentions facilities located outside of Chollas Creek and existing storm water management features are neither the only means of compliance with the TMDLs nor even a reasonably foreseeable means to the extent suggested by the City. Such facilities are unlikely to be implemented to the degree described by the City due to the associated costs and impacts to housing. Since condemning property is

> unlikely, the San Diego Water Board was not required to analyze this impact as reasonably foreseeable.

This comment puts the proverbial cart before the horse. The first question in the foreseeability of a means of compliance is whether it is ***necessary to achieve compliance***. The Regional Board's comment does not completely refute the contention that treatment facilities will be employed. Hence, detention facilities or treatment works are a reasonably foreseeable means of compliance. The Regional Board's analysis repeats this error in the next sentence; it concludes that the impacts to land use and other resources are not reasonably foreseeable because of the expense. It states that these means of compliance will not be used because of the impact to housing. That begs the question: what impact to housing? Neither Appendix I or Chapter 12 discuss impacts to housing. The April 7th letter concedes that the impacts will occur the impact is not identified in Appendix I or discussed anywhere in Technical Report. This thwarts one of the basic purposes of CEQA because neither the public nor the Regional Board members know the potential housing impact and is a prima facie prejudicial abuse of discretion. The second error is that, having concluded that the impact will occur, it assumes that it will not be significant. CEQA does not require analysis of only significant impacts, it requires analysis to determine the level of impact – once again something that was not done and is a prejudicial abuse of discretion.

Thus, the only facts that are available undercuts the Regional Board's contention that treatment controls are not a reasonably foreseeable method of compliance, which under Public Resources Code section 21159(a), must have its impacts analyzed.

As respects site specific analyses, Public Resources Code section 21159(c) unambiguously states that an analysis shall take into account a reasonable range of specific sites. A contrary contention is simply an incorrect statement of the law.

### B. The TMDL and Environmental Analysis Do Not Satisfy the Criteria For Tiering

When applying statutes, specific statutes control over general. *See Cavalier Acres, Inc. v. San Simeon Acres Community Services District*, 151 Cal. App. 3d 798 (1984) (Where there is a specific provision requiring community services district to increase rates via ordinance, that specific statute controls over general provision allowing public entities to increase rates via resolution).

Here, the general provisions relate to tiered CEQA documents. *See* PUBLIC RESOURCES CODE § 21093 and 21094. The environmental analysis attempts to justify giving short-shrift to the topics required by Public Resources Code section 21159(c) under the guise of tiering; this violates the rule that specific provisions control over the general. Moreover, there are other problems with the Regional Board's reliance on the tiering provisions.

First, both Public Resources Code section 21093 and 21094 refer to the preparation of an environmental impact report as the first tier document. As the Regional Board readily notes, the environmental analysis for the basin plan amendment is **not** an EIR. *See* Remy, et al, *Guide to the California Environmental Quality Act*, 10th ed., at 495 (The definition of tiering "suggests that tiering must commence with the preparation of an EIR.") Thus, there is no authority for the proposition that the Regional Board may use a substitute document as a first tier CEQA document.

Further complicating this aspect of the Regional Board's environmental analysis are the specific provisions of CEQA Guidelines section 15253, which governs the use of an EIR substitute by a responsible agency. Specifically, subdivision (a) states a substitute document shall be used by another agency "granting an approval ***for the same project*** where the conditions in subdivision (b) have been met." Subdivision (c) of that same Guidelines section amplifies this limitation, stating:

> Where a certified agency does not meet the criteria in subdivision (b), any other agencies granting approvals ***for the project*** shall comply with CEQA in the normal manner.

Hence, the CEQA Guidelines make clear that the only permissible uses of a substitute document are with respect to that project, and not with subsequent related projects. Accordingly, it is inappropriate to treat the Basin Plan Amendment environmental analysis as a "first tier" document because no second tier document can legally flow from a "first tier substitute document."

It is also important to note that under CEQA Guidelines section 15253 subdivision (b), it is a responsible agency that may use the substitute document for subsequent approval of the project. Responsible agencies are "public agencies other than the lead agency which have discretionary approval power over the project." CEQA Guidelines section 15381. The only other California agency that has discretionary approval power over the Basin Plan amendment is the State Water Resources Control Board. Neither the Regional Board nor the State Board will issue subsequent approvals related to this project that will require CEQA compliance. Hence, the authorization in CEQA Guidelines section15253 does not apply to any subsequent activity that will involve site-specific impacts or any of the other analyses the Regional Board contends may be deferred until the second tier projects are implemented. Accordingly, the notion that the TMDL environmental analysis will serve as a first-tier analysis is nonsense.

In the April 7th letter, the Regional Board cites CEQA Guidelines section 15253 for the proposition that it need not change its CEQA processes to meet the needs of other agencies. This comment misses the point: if the analysis cannot be used by other agencies because it is not an adequate document for that purpose, then the Regional Board cannot justify its cursory analysis by contending that these agencies will tier off of the Regional Board's document. If the document is inadequate for use by other agencies,

those agencies have to start from scratch and the Regional Board's document is of no value.

Second, Public Resources Code § 21093 states that the purpose of tiering is to expedite the construction of housing and other development projects by eliminating repetitive environmental review. Here, the project is not a development project; it is the imposition of performance or treatment standards. Thus, this activity does not fall within the type of projects the Legislature sought to expedite through tiering, and accordingly, there is no legal basis for the Regional Board to rely upon these principles in analyzing the impacts of the TMDL.

### C. The Technical Report Has An Inadequate Project Description and Inadequately Examines The Compliance Alternatives

A critical component of an EIR is the environmental setting. In San Diego County watersheds, many of the tributaries: (1) are surrounded by developed areas within which storm water is conveyed by storm drains to outfalls at canyon rims; (2) lie within canyons and contain "waters" which originate at the end of the storm drains; and (3) are ephemeral and dominated by urban runoff during all but infrequent precipitation. However, the Initial Study (page R-1 of the draft Technical Report) describes the environmental setting of much of the affected areas in one paragraph, despite the fact that the some affected watersheds are distinctly different than others. For example, the environmental analysis is incorrect in characterizing the Miramar, Scripps, and Chollas Creek watersheds as having "inland areas [that] primarily consist of open space with some agricultural/livestock uses." These areas are almost completely urbanized; no portion of these watersheds "consist primarily of open space."

The project description is also a critical component of an adequate environmental document. *See Santiago County Water District v. County of Orange*, 118 Cal.App.3d 818 (1981) (EIR inadequate because of failure to discuss construction of water delivery facilities in project description). The project description in this case is influenced by Public Resources Code section 21159, which provides the ***minimum*** requirements for an environmental analysis of a rule or regulation that requires the installation of pollution controls.[4] That statute requires certain state agencies to analyze the following:

> (1) An analysis of the reasonably foreseeable environmental impacts of the methods of compliance.
> (2) An analysis of reasonably foreseeable feasible mitigation measures.
> (3) An analysis of reasonably foreseeable alternative means of compliance with the rule or regulation.

[4] The statute clearly states that these topics are the minimum requirements for an adequate environmental analysis; other impacts must be identified if the impacts are a direct result or a reasonably foreseeable indirect result of the project.

PUBLIC RESOURCES CODE § 21159(a)

Thus, the methods of compliance are part of the project description because the impacts, mitigation measures, and alternatives to the methods of compliance must be analyzed.

With that in mind, it is easy to see that the project description in this case contained only a cursory discussion of the methods of compliance. The Technical Report for the TMDL states that the required reduction in pollutants may be achieved by education, street sweeping, storm drain cleaning, BMP inspection and maintenance, manure fertilizer management plans, buffer strips and vegetated swales, bioretention, infiltration trenches, sand filters, diversion systems, animal exclusion, and waste treatment lagoons (for manure storage). The TMDL document is devoid of evidence that suggests that the pollutant reductions required to achieve full compliance with the TMDL can be achieved by anything other than: (1) diversion or (2) detention and infiltration.

Having identified the types of facilities that could be constructed to achieve compliance (diversion and detention/infiltration), Public Resources Code section 21159, subdivision (c) kicks in to specify the details of the analysis that is required in terms of environmental, technical, and specific sites. Thus, issues that must be included to properly address these considerations in the scope of this TMDL include:

1. The "tributary rule," which subjects all receiving waters within the affected watersheds to the TMDL. The application of this rule in complying with this TMDL creates an interesting overlay in that the TMDL does not define "receiving waters, yet the San Diego County Municipal Storm Water NPDES permit states that in some instances receiving waters and the MS4 are the same;

2. Topography, which prevents BMP works from being built on canyon walls below storm drain outfalls but above receiving waters that are subject to the WQO in the TMDL;

3. The structural BMPs need to capture and treat a very high percentage of storm water due to the large level of loading reduction required by the TMDL; i.e., it is not reasonable to expect that works located far from the storm drain outfalls would, by themselves, meet the TMDL because significant amounts of storm water run into the conveyance system immediately above the outfalls.

4. Locating works some distance from the receiving waters would be infeasible because it would be necessary to construct a new, separate conveyance system to prevent the treated water from mixing with untreated water.

5. The number of control devices that may be required to achieve compliance is a technical consideration in complying with the TMDL. Because the TMDL defines the WLAs without regard to the size of a rain event, loading must be controlled in all storm events. Accordingly, certain assumptions must be made with respect to the size of

the storm in order to design structural BMPs that will provide adequate contaminant reduction. Lacking a "design storm," or information on soil infiltration rates, the Regional Board's CEQA analysis must include assumptions regarding a design storm size and the acreage of detention/infiltration facilities that would be needed (including any manufactured slopes). Information is available from the City of San Diego, the California Department of Conservation, and the United States Soil Conservation Service on soil infiltration rates that would be necessary in this analysis. For purposes of revising the CEQA analysis, the Regional Board should consider that the Chollas Creek watershed has approximately 816 storm drain outfalls within the City of San Diego to determine the effectiveness of infiltration.

The project description in the CEQA analysis is devoid of any discussion or analysis of these issues, and thus is inadequate because the failure to include this information prevented a meaningful analysis of the impacts of compliance.

The City has previously note that it is reasonably foreseeable that the TMDL implementation could require the City to build a large number of relatively smaller sized works in areas immediately behind a geologically-safe setback above all existing storm drain outfalls which have receiving waters immediately below them. In the Chollas Creek watershed, these works could occupy 1,387 acres – almost 10 percent of the 16,273 total acres in the watershed.

### D. The Environmental Analysis Does Not Analyze the All Impacts Associated With Construction of Structural BMPs

Only when a meaningful discussion of the environmental setting is set forth and a thorough project description has been prepared can an adequate analysis of impacts and mitigation measures be prepared. *County of Inyo v. City of Los Angeles*, 71 Cal.App.3d 185 (1977). Here, the Regional Board has put itself in an "Catch-22." While the Regional Board contends that it is not reasonably foreseeable that treatment controls will be used as a compliance method, it nevertheless analyzed the impacts – albeit poorly – of diversion structures. Having analyzed some of the impacts to diversion structures, the Regional Board must ensure that the analysis is complete, and supported by substantial evidence. CEQA determinations related to quasi-legislative decisions must be supported by substantial evidence. *See* PUBLIC RESOURCES CODE § 21167.5; *Western States Petroleum Association v. Air Resources Board*, 9 Cal.4th 559 (1995).

Substantial evidence is defined in CEQA as:

> For the purposes of this section and this division, substantial evidence includes fact, a reasonable assumption predicated upon fact, or expert opinion supported by fact.

> Substantial evidence is not argument, speculation, unsubstantiated opinion or narrative, evidence that is clearly inaccurate or erroneous, or evidence of social or economic impacts that do not contribute to, or are not caused by, physical impacts on the environment.

PUBLIC RESOURCES CODE § 21080(e)

The following analyses in Chapter 13 and Appendix I are deficient because the conclusions are not supported by substantial evidence:

a. Aesthetics –

Appendix I states that the creation of structural BMPs can create adverse aesthetic impacts. The Regional Board's analysis of this impact states:

> Depending on the controls chosen, the project may result in the installation of urban runoff storage, diversion, or treatment facilities and other structural controls that could be aesthetically offensive if not properly designed, sited, and maintained. Many structural controls can be designed to provide habitat, recreational areas, and green spaces in addition to improving urban runoff water quality. In-creek diversions should not be used as controls, therefore, there should be no adverse impacts on aesthetics resulting from construction of concrete-lined basins or treatment facilities within creeks.

This analysis is legally inadequate because it does not state what constitutes a significant aesthetic impact and how designing the treatment works to serve as habitat, recreational areas, or green spaces mitigates any adverse aesthetic impact, much less mitigating any significant, adverse impact below the level of significance. It addition, the analysis ignores the reasonably foreseeable size and location of the BMPs described above; the works would be too small and subject to too many edge effects to create sustainable habitat. Moreover, regular maintenance would require periodic removal of plant growth and sediments. Topographically, it is reasonable to assume that basins associated with the works will need to be excavated and that significant portions of the basins would consist of manufactured slopes, limiting recreational opportunities. Thus, the "analysis" is merely "speculation, unsubstantiated opinion or narrative" that does not support the conclusion that the listed impact will be reduced below the level of significance, and is not, therefore, supported by substantial evidence, as required by law.

b. Air Quality –

Appendix I makes the following statement regarding Air Quality:

> The construction of structural controls might adversely affect air quality because construction might require the use of diesel fuel engines to operate equipment. Potential impacts are likely to be limited and mostly short-term in nature. Impacts may be mitigated through measures such as limiting hours and amount of construction, eliminating excessive idling when vehicles are not in use, limiting construction during periods of poor air quality, and/or using alternative fuel vehicles rather than diesel fuel vehicles. Any impacts to air quality, both short-term and long-term, would be subject regulation by the appropriate air pollution control agencies under a separate process.

This analysis is deficient because the analysis does not state what the threshold of significance for impacts to air quality from toxic air pollutants, nor does it have any basis for concluding that the programs implemented by air pollution control agencies will, in fact, reduce any impacts below the unstated threshold of significance. Thus, the "analysis" is merely "speculation, unsubstantiated opinion or narrative" that does not support the conclusion that the listed impact will be reduced below the level of significance, and is not, therefore, supported by substantial evidence, as required by law.

This analysis is also deficient because, to the extent that street sweeping is a reasonably foreseeable means of compliance, Appendix I incorrectly states that there is no impact to the applicable air quality plan.

c. Biological Resources –

Appendix I states that there are potential impacts to riparian habitat or other sensitive natural community identified in local or regional plans, policies, regulations, or by the California Department of Fish and Game or US Fish and Wildlife Service, but that those impacts would be reduced below the level of significance through mitigation.

The analysis does not state what sensitive species are located within the project area. It does not mention the San Diego County Multiple Species Conservation Plan – a regional plan that addresses impacts to sensitive species. The cursory analysis seems to assume that the only manner in which habitat or species can be impacted is through urban runoff flow diversion; even though the construction of treatment works could displace non-riparian species. Given the experience with the Aliso Creek bacteria treatment facility, it is reasonable to assume that upland impacts may occur as a result of the need to intercept sheet flow runoff from canyon walls for treatment before these flows enter receiving waters. These interceptors would logically be located near and above the receiving waters - in areas where many canyons support native, upland vegetation and sensitive species. Accordingly, impacts would result not only from construction of the diversions, but also from construction of treatment works and the associated pumps that would be

necessary to put the treated water back into the receiving waters at a location near its diversion point.

Once again, the analysis does not contain facts, reasonable assumptions predicated on facts, or expert opinion based on facts; it is merely "speculation, unsubstantiated opinion or narrative" that does not rise to the level of substantial evidence.

d. Cultural Resources –

Appendix I completely fails to address potential impacts to cultural resources. There is ample evidence available from local land use agencies about the location of cultural resources in San Diego County.

The affected watersheds are located in parts of San Diego that are designated as "Urbanized" or "Urbanizing" by the City's Progress Guide and General Plan because they are fully developed or in the process of being developed. Many structures within the watersheds were built prior to 1960, making them at least 45 years old and thus potentially significant historic resources under the criteria in 14 C.C.R. section 15064.5(a)(3)(C). Thus, with regard to checklist item V(a), the loss of an undetermined number of significant historic structures (located above storm drain outfalls/tributaries) should be considered a potentially significant effect.

With regard to checklist item V(b), it is generally accepted by land use agencies that because many older structures were built prior to or without the benefit of heavy earth-moving equipment, the soils underneath older structures have the potential to contain potentially significant archaeological resources. Therefore, the excavation of soils under potentially significant historic resources should be considered to have a potentially significant effect on archaeological resources.

Similarly, many formational materials within the watersheds are fossiliferous (Kennedy, 1977). Therefore, given that excavation of detention works could penetrate through surficial soils and into ungraded formational materials, the response to checklist item V(c) should indicate that this impact is potentially significant.[5] Because the environmental analysis does not discuss impacts to these resources or propose mitigation measures, the environmental analysis is inadequate.

e. Hydrology and Water Quality

---

[5] The "Kennedy Maps" are maps of geologic formations that may contain specific paleontological resources, and are specifically used by planning and land use agencies to identify the potential for significant paleontolgical resources. Such resources occur within the City of San Diego, and therefore could occur within the Chollas Creek watershed. *See* Geology of the La Jolla, Del Mar, La Mesa, Poway, Point Loma, and Southwest Quarter of the Escondido Quadrangles, San Diego County, California, by Michael P. Kennedy, 1975; and Geology of National City, Imperial Beach, and Otay Mesa Quadrangles, Southern San Diego Metropolitan Area, California, by Michael P. Kennedy and Siang S. Tan, 1977.

Appendix I states that the diversion of storm flows and dry weather urban runoff would cause impacts to existing drainage patterns, but concludes that any such impact would be less than significant because "diversion of the entire stormflow of a creek is not required to meet wasteload allocations."

This statement is not supported by facts, reasonable assumptions predicated on facts, or expert opinion based on facts. There is no technical way for an MS4 operator to ascertain what percentage of a storm flow must be diverted for a particular storm to ensure that the pollutant loads do not exceed the wasteload allocations. If treatment is necessary, all storm flow must be detained and treated to ensure that the standards are met. Thus, the conclusion that this impact will be less than significant is ; "speculation, or unsubstantiated opinion" that does not rise to the level of substantial evidence.

f. Geology and Soils –

Appendix I concludes that there will be no impacts to Geology and Soils. This conclusion is no supported by substantial evidence.

Excavating infiltration works in the vicinity of canyon rims has the potential to make canyon walls unstable (only basins serving an equalization purpose could be lined). Increasing infiltration increases instability even if the slope in question is already engineered. For slopes that aren't engineered (and this is the case in older neighborhoods – see above), this instability can lead to failure. Increasing the integrity of slopes downhill of detention works could also result in increased impacts to biological resources or, if retaining walls are used, aesthetic impacts. Therefore, as a result of the project change, checklist item V(c) should indicate that the geology impact from the project is potentially significant.

For purposes of revising the CEQA analysis, we suggest that the Board consider that works which involve any level of infiltration be setback from a canyon rim such that a 45 degree line drawn from the bottom of the basin nearest the canyon rim does not intersect the canyon wall.

g. Land Use and Planning –

Checklist Item IX(b) indicates that the project would not conflict with any applicable land use plan, policy or regulation of an agency with jurisdiction over the project adopted for purposes of avoiding or mitigating and environmental effect." This conclusion is not supported by substantial evidence; substantial evidence supports the opposite conclusion. The following examples are taken from the Chollas Creek watershed; a similar analysis should be made of all watersheds.

First, while the Regional Board's environmental analysis foresees the need to construct works, because no analysis was done on the required number or location of treatment works, the analysis does not discuss the need for the City to acquire and demolish

hundreds of acres of developed land uses in order to construct the works. This is inconsistent with the only listed impact in the draft environmental analysis, where Regional Board staff discusses the impacts from operating a works that detains water – the works has to be constructed before it can be operated. Because the Regional Board did not properly analyze this impact, the Regional Board's analysis incorrectly concludes that the impacts will be less than significant or that they can be mitigated to below the level of significance. This conclusion is incorrect because it does not consider the following:

*Housing*

The Housing Element of the City's adopted General Plan and the position taken by the City Council when declaring a "Housing State of Emergency" both have as a basic objective an increase in the housing supply. According to Appendix E of the Technical Report, low and high density residential uses account for almost 64% of the land uses within the Chollas Creek Watershed. On average, this means that 64% of the 480-1400 acres if land that would be occupied by treatment works (307 to 896 acres) is currently developed with homes. Assuming an average of 10 dwelling units per acre (4,000 square foot lots are common in the watershed), this equates to the loss of 3,070 to 8,960 units. Removal of this number existing dwelling units would decrease the housing supply and is thus in conflict with adopted City policy.

*Industrial Land*

The Industrial Element of the City's adopted General Plan states that there is a serious shortage of large parcels suitable for industrial development exists in the City. Related goals and recommendations include:

> "Insure that industrial land needs as required for a balanced economy and balanced land use are met consistent with environmental considerations" (p.286)
>
> ""Protect a reserve of manufacturing lands from encroachment by non-manufacturing uses." (p. 286)
>
> "As mentioned earlier, in allocating additional land for industrial use it is imperative that sufficient acreage be designated to meet projected needs so that the existing market can operate effectively." (p.287)
>
> The general theme of the existing Industrial element is precisely this shortage of industrial land, high industrial and prices, etc. and how the economy is negatively affected by the non-industrial use of industrial land. The supply increased only slightly since 1979 and has not increased since. In fact it is now at crisis level proportions.

According to Appendix E of Region 9's Technical Report, low and high density residential uses account for 3.12% of the land uses within the Chollas Creek Watershed. On average, this means that 3.12% of the 480-1400 acres of land that would be occupied by treatment works (15 to 43.7 acres) is currently developed with industrial uses.

The removal of housing and industrial acreage from the City's stock in order to build storm water treatment works required to comply with the TMDL would conflict with the City's General Plan and its declared Housing State of Emergency. Therefore, as a result of the project change, checklist item IX(b) should indicate that the Land Use and Planning impact from the project is potentially significant with respect to the loss of residential and industrial lands. The environmental analysis in inadequate because it failed to analyze this impact.

Given that none of the City's land use plans identify storm water treatment works and the nature of detention/infiltration works, the City believes that land use impacts would be significant and suggests that the Regional Board evaluate the City's plans to determine where and the extent to which inconsistencies would result.

h. Population and Housing –

Checklist item XII(c) indicates that there would be no displacement of substantial numbers of people, necessitating the construction of replacement housing elsewhere. Within the Chollas Creek watershed alone, the number of dwellings that would be lost as a result of the project change (3,070 to 8,960) should be considered substantial. According to U.S. Census Data, the average dwelling unit in San Diego houses 2.6 people. The loss of 3,070 to 8,960 dwelling units would therefore result in the displacement of 7,982 to 23,296 people. This number of dwellings that would be lost as a result of the project change should be considered substantial. Therefore, as a result of the project change, checklist items XII (b) and XII (c) should indicate that the Population and Housing impact from the project is potentially significant.

The City believes that this is in and of itself a significant impact and suggests that the Regional Board conduct a similar impact evaluation in all of the watersheds that would be subject to the TMDL.

i. Utilities and Service Systems –

Checklist item XVI (c) indicates that the project will not require or result in the construction of new storm water drainage facilities or expansion of existing facilities, the construction of which could cause significant environmental effects. This is directly contradicted by the Technical Report, and given that the project change causes the additional significant impacts cited above, there is even more reason why this item should indicate that the Utilities and Service Systems impact from the project is potentially significant.

Given that the project change will result in previously undisclosed significant effects, CEQA compliance to date has deprived interested parties the opportunity to provide meaningful comment. In particular, we suggest that opportunity to comment be provided to historic preservationists, housing advocates, industrial developers, and those interested in public policy as it pertains to preservation of San Diego's shrinking supply of industrial lands.

Regional Board staff has, in the past, stated that it need not conduct a detailed analysis because it contends that the TMDL environmental analysis functions as a "first tier document," or would be speculative These statements are inaccurate because:

- Tiering does not excuse the lead agency from adequately analyzing the reasonably foreseeable significant environmental effects of the project and does not justify deferring such analysis to a later tier EIR or negative declaration." 14 C.C.R. Section 15152(b).
- Lead agencies cannot hide behind an inadequate analysis and leave it to the public to produce the necessary substantial evidence regarding adverse impacts. *Gentry v. City of Murietta*, 36 Cal.App.4$^{th}$ 1359, 1379 (1995). While foreseeing the unforeeable is not possible, the agency must find out and disclose all that it reasonably can. 14 C.C.R. § 15144.
- To claim that an impact is speculative and terminate a discussion requires analysis – it does not excuse a failure to investigate and analyze. *See Marin Municipal Water District v. KG Land California Corporation*, 235 Cal.App.3d 1652 (1991) *and* 14 C.C.R. Section 15145. The record does not support a finding that the Regional Board has conducted this investigation

### E. The Regional Board Has Not Adequately Analyzed the Cumulative Impacts of All Proposed TMDLs

CEQA requires that cumulative impacts be assessed as part of determining whether a project may have a significant effect on the environment (CEQA Guidelines Section 15064(h)(1). A Lead Agency may determine that a project's incremental contribution to a cumulative effect is not cumulatively considerable if the project will comply with the requirements in a previously approved plan (CEQA Guidelines Section 15064(h)(3). However, Section 15064(h)(3) also requires preparation of an EIR (meaning a finding that the cumulative impact is significant) if there is substantial evidence that the possible effects of a particular project are still cumulatively considerable, notwithstanding that he project complies with the specified plan. Cumulatively considerable means that the incremental effects of a project are significant when viewed in connection with the effects of past projects, the effects of other current projects, and the effects of probable future projects."

The initial study checklist indicates that cumulative impacts from the project will not occur, but no rationale is provided for that conclusion. CEQA Guidelines Section 15130(b) describes alternative lists of projects and projections that an agency is required to consider when evaluating significant impacts. Given that the Regional Board has a mandate to adopt TMDLs for receiving waters on the 303(d) list, the checklist should, at a minimum, consider the impacts of this project in the context of impacts that would result from reasonably foreseeable means of compliance with other TMDLs. One glaring omission in this analysis is the fact that the Regional Board has concluded that the Bacteria Project I TMDL, which affects Chollas Creek, will have individual project impacts. There is no analysis to show support the conclusion that the impacts of the Bacteria I TMDL and the Chollas Creek metals TMDL, though less-than-significant individually, will not be cumulatively considerable. See CEQA Guidelines § 15064(h)(3).

### F. The Alternatives Analysis Is Inadequate

The State Water Resources Control Board regulations for complying with CEQA require a substitute document to contain an analysis of reasonable alternatives to the proposed action. Here the only alternatives analyzed are the "no action" alternative, and the "reference system approach." This is an inadequate range of alternatives. *See Citizens of Goleta Valley v. Board of Supervisors*, 52 Cal.3d 553 (1990)[Requiring a reasonable range of feasible alternatives.

Here, the Regional Board has failed to explain why to the extent that the implementation plan is part of the project, whether a longer compliance schedule will result in pilot project technology becoming mainstream technology that can be deployed and reduce certain impacts.

The City has previously submitted comments on this proposal, including the Regional Board's efforts at CEQA compliance; this letter and its attachment addresses many of the issues previously raised and includes even more substantial evidence regarding the environmental impacts of the project. The City's most recent correspondence on TMDL was addressed to the State Water Resources Control Board and is dated January 6, 2006. That letter and Board staff's April 7, 2006 responses, a Discussion Paper entitled "Adequacy of the Environmental Review Documents for the Chollas Creek Metals TMDLs", April 6, 2006) are included as Attachments 1 and 2 so as to make them part of the administrative record for the current proceedings. As required by the State Water Resources Control Board's regulations, the City respectfully requests written responses to our January 6, 2006 letter (to the extent responses were not provided in Attachment 2) and this letter.

## IV. Conclusion

Please contact me if you have any questions regarding this letter. Thank you once again for the opportunity to comment on this project.

Sincerely,

Chris Zirkle
Deputy Director

Attachments: 1 – City's January, 2006 Letter Regarding the Chollas Metals TMDL
2 – Regional Board staff April 7, 2006 Response to Attachment 1
3 – BMP Feasibility Analysis, Weston Solutions, September, 2006
4 – Study by Ellen Bauder Indicating the Historical Presence of Vernal Pools in the Chollas Watershed
5 – Interim Report on Aerial Deposition in San Diego, Weston Solutions, September, 2006

## I. TMDL INTERIM COMPLIANCE SCHEDULE

COMMENT 1. The compliance schedule, including the interim compliance goals, is inconsistent with the Technical Report's assessment of how dischargers will likely implement this TMDL because it requires the most difficult reductions in pollutant loading to occur in less than one-third of the compliance schedule. Because these pollutant reductions will require the most intensive BMPs, likely structural BMPs, it is unreasonable to expect these reductions to occur within three years after non-structural BMPs have been fully implemented because the data on where these BMPs will be necessary will not be complete.

COMMENT 2. The compliance schedule has interim compliance goals of a 15 percent reduction in wasteload allocation exceedences in Year 4 and a 50 percent reduction in wasteload allocation exceedences in Year 7. Please identify all considerations that served as the basis for suggesting these percentages and the compliance dates.

COMMENT 3. The technical report states that MS4 operators, as NPDES permit holders, will receive a revised permit with WQBELs. The Technical Report also states that WQBELs may be numeric or non-numeric. Does Regional Board staff know if it will propose numeric or non-numeric WQBELs for San Diego Regional MS4 co-permittees? If so, please identify likely WQBELs.

## II. GENERAL TECHNICAL COMMENTS

COMMENT 4. *The TMDL uses a non-integrated, TMDL approach.* We recommend integrated watershed based TMDLs to allow for the development and implementation of more holistic, efficient programs to improve water quality.

COMMENT 5. *The TMDL schedule does not allow for maximizing the use of non-capital and non-land intensive BMPs.* The TMDL fails to allow sufficient time for the City to identify the most effective combination of BMPs and minimize dislocation of residents and businesses through an iterative approach to BMP implementation.

COMMENT 6. *The TMDL does not provide adequate guidance for compliance.* Neither the technical report nor the CEQA analyses designate a design storm. Knowing the capacity required of a BMP is critical to designing facilities which will comply with the TMDL while minimizing acreage requirements and capital costs.

COMMENT 7. *The TMDL requires the City to maintain dry weather flows.* This is contrary to Municipal Permit requirements which seek to eliminate these human-generated, flows and would force the City to construct costly low-flow treatment systems in addition to parallel systems for wet weather flows.

COMMENT 8. *Inappropriate application of the tributary rule.* The TMDL requires load reductions prior to discharge into any receiving water, including open concrete channels. Under this interpretation, the Regional Board would no longer provide an incentive to replace concrete channels with vegetation because the vegetation would not address the non-compliance of waters upstream of the revegetation site.

## I. CUMULATIVE IMPACT ANALYSIS AND TMDL INTEGRATION

The City is particularly concerned that the CEQA documents for this proposal do not fully disclose the impacts of the project to the public or decision makers, that the 10-year implementation timeline is unrealistic, and that this proposal does not consider the pending TMDL for bacteria that will also apply to the Chollas Creek watershed.

COMMENT 9. The CEQA analysis must include consideration of the impacts of implementing the bacteria TMDL in its cumulative impact analysis.

COMMENT 10.: When considering BMPs to address the TMDL, the City must consider the effectiveness of a BMP to address both TMDLs. The Regional Board should consider the bacteria and metals TMDL as a single, integrated TMDL with an appropriate implementation schedule similar to the dissolved metals TMDL adopted by the Los Angeles Region for Ballona Creek and the Los Angeles River. As suggested by the Stakeholders' Advisory Group for the Bacti-1 TMDL, the City suggests that a 20-year implementation schedule is more realistic.

COMMENT 11.: Given the magnitude of BMPs that need to be built in order to comply with the TMDL, the proposed 10-year implementation schedule essentially guarantees non-compliance. Additional time is needed to evaluate the feasibility and effectiveness of the complex suite of BMPs that could be built in "treatment train" fashion to achieve TMDL compliance in some parts of the watershed. This "neighborhood friendly" compliance scenario is described in Attachment 3 and is proposed by the City in lieu of a more aggressive "infrastructure intensive" solution that would achieve compliance sooner.

## II. REASONABLY FORESEEABLE ALTERNATIVE MEANS OF COMPLIANCE

A. Types of BMPs

Attachment 3 to this letter is a report that the City has had prepared by Weston Solutions. This report provides substantial evidence that the City will have to undertake a massive public works program in order to implement the metals and bacteria TMDLs and that the implementation program has the potential to result in significant environmental effects. The Weston report clearly indicates that the only ways that the load reductions for bacteria and metals required by the TMDL in at least portions of the Chollas Creek watershed can be achieved are by 1) preventing urban runoff and storm water from

exiting the 800 storm drains outfalls in the watershed or by 2) treating the water using advanced technologies. The Regional Board response to previous City comments on this issue is that the City is wrong with regard to the percent of load reduction required. Since the TMDL is a concentration-based WLA that applies to all waters of the state in the watershed, applying an average concentration to the required load reductions is scientifically correct. If the Regional Board is going to persist with this contention, the Technical Report should contain a detailed analysis as to how a discharger complies with a concentration-based WLA using average reductions. Further the use of chlorine, or other disinfectants, ozone or ultraviolet light will likely be necessary to achieve the Wasteload Allocations proposed in the Bacti-1 TMDL.

COMMENT 12.: The CEQA analysis and the Technical Report suggest a number of BMPs that can be used to comply with the TMDL. Regional Board documentation should include data references that documents the efficiency of these BMPs in dry and wet weather with respect to removing dissolved metals and bacteria. For example, the City believes that it is misleading to state that dissolved metals loading can be reduced significantly by increased educational efforts.

COMMENT 13.: The CEQA analysis must assess the impacts of installing structural best management practices for both TMDLs, including the impacts to land uses that would be displaced by such installations. The CEQA document improperly limits its description of these impacts to aesthetics, air quality, biological resources, and noise. In addition to outright displacement of existing development for construction of BMPs, it is reasonably foreseeable that BMPs will be built adjacent to existing development. The CEQA analysis should assess the impacts of building BMPs on adjacent foundations and slopes. In its Discussion Paper, the Regional Board indicates that condemnation of land is unlikely. The Regional Board should programmatically evaluate the suitability of publicly owned land in the watershed for BMP construction. Public lands are mapped in Attachment 3.

The Board's CEQA analysis suggests that TMDL compliance may be at least partially achieved by preventing storm water and urban runoff from exiting the storm drains through infiltration. However, Attachment 3 includes substantial evidence, in the form of a map prepared by the Natural Resources Conservation Service, that soils in the watershed are mostly impermeable. Attachment 4 (Bauder) provides additional substantial evidence regarding the impermeability of soils in the watershed in the form of a paper which describes how vernal pools were located in the watershed prior to development.

COMMENT 14.: While the City acknowledges that neither the Bauder map nor the Natural Resources Conservation Service map are site specific and that there may be opportunities for infiltration within the watershed, the CEQA document should state a programmatic basis for concluding that infiltration in areas upstream of receiving waters has wide-spread feasibility and is therefore a reasonably foreseeable means of compliance (see Comment 23 below regarding bacterial regrowth and the section entitled

"Tributary Rule" below for a discussion on BMP siting constraints). In fact, the CEQA document should include a rationale or list of references that were used to draw conclusions regarding the potential significance of impacts in all issue areas. As written, the checklist is "naked" with respect to issues with which Board staff has found no potentially significant impact.

COMMENT 15.: As a mitigation measure associated with the potential for metals to accumulate in infiltration facilities and then contaminate groundwater, the CEQA checklist mandates regular maintenance and disposal of waste. This requirement could limit the construction and/or reconstruction of public and private facilities over the infiltration facility. The CEQA document must assess this impact along with a description of how and for what purpose maintenance is expected to occur, and the limits of building or re-building improvements on top of at-grade and below-grade infiltration facilities. The failure of the CEQA analysis to address these issues leaves more questions that answers, including:

- What is the potential for pollutants to travel through an infiltration facility and contaminate adjacent native soils or groundwater?
- What is the potential for pollutants which have reached groundwater to reach receiving waters in concentrations in excess of the WLAs?
- Will the Regional Board have subsequent regulatory authority over the construction of these facilities?
- If not, can mitigation be assured?
- If mitigation cannot be assured, shouldn't this potential impact be considered significant?
- Is there a concentration of any pollutant above which urban runoff cannot be infiltrated? If so, does urban runoff with the Chollas Creek watershed exceed this concentration at any time?

COMMENT 16.: Either compliance option, diversion via infiltration or treatment, will reduce sediment loading into Chollas Creek. The CEQA document should assess this impact.

The City estimates that dry weather flows exit from approximately 528 of the 800 storm drains outfalls in the watershed (66%). These dry weather flows support wetland vegetation in Chollas Creek and its tributaries that probably would not exist but for the flows and probably did not exist prior to urban development of the watershed. Eliminating these flows by infiltrating them would eliminate certain receiving waters and the associated aquatic and wetland life. Accordingly, the CEQA documents for both TMDLs require as mitigation the return of "treated water into the creek in the same location, and at the temperature and flow velocity to maintain the creek's hydrology (page 89 of the metals TMDL Technical Report, page 14 of the metals TMDL environmental checklist and page R-14 of the checklist for the bacteria TMDL). Assuming that the intent is not to discharge treated, potable water from the existing drinking water distribution system into receiving waters, the construction of urban runoff treatment facilities is required. Moreover, to prevent bacterial regrowth in the MS4

downstream of the treatment facilities, the treatment facilities must be built immediately above the storm water outfalls.

COMMENT 17.: The mitigation measure which requires maintaining the hydrology of receiving waters and wetlands also necessitates the construction of treatment facilities for dry weather flows (immediately upstream of the storm drain outfalls to minimize the potential for bacterial regrowth above the outfall). Total compliance via infiltration is therefore infeasible. As an alternative to treating all flows, the requirement to maintain dry weather flows in receiving waters sets up another reasonably foreseeable means of compliance: that the City will treat dry weather flows and return them to the creek where they currently flow, that the City will infiltrate wet weather flows where it is practicable, and that the City will treat wet weather flows where it is impracticable. The CEQA document must address the impact of this reasonably foreseeable means of compliance.

COMMENT 18.: Should treatment facilities designed to maintain creek hydrology and wetlands be designed to retain existing hydrology/wetlands (as affected by development) or should treatment facilities be designed to discharge water to mimic pre-development conditions? If the latter, what are the characteristics of pre-development hydrology and wouldn't this have an adverse impact on wetland vegetation that is dependent upon dry weather urban runoff?

COMMENT 19.: The City is unclear as to the Board's overall policy with respect to hydrology and wetlands that are present only because of human-induced dry weather flows. Which does the Board see as more important – the maintenance of post-development hydrology/wetlands or the reduction of [clean] dry weather flows?

B. Location of BMPs and Tributary Rule

City comments have previously indicated that the bacteria and metals TMDLs will require the construction of storm water treatment facilities on currently developed private property. In its document entitled "Adequacy of the Environmental Review Documents for the Chollas Creek Metals TMDLs" (April 7, 2006), Regional Board staff writes that:

> "the City [improperly] interprets the tributary rule to require strict attainment of the most stringent downstream water quality objectives throughout Chollas Creek and its tributaries".

Further, above-referenced discussion paper states that,

> [w]hile all waters tributary to Chollas Creek should be of a quality consistent with the attainment in Chollas Creek of the water quality objectives necessary to support the beneficial uses designated for Chollas Creek and San Diego Bay, this policy does not, necessarily, preclude the installation of pollutant reduction BMPs in Chollas Creek or its tributaries. Source control is the preferred means of compliance with the [dissolved metals] TMDLs. However, in-stream structural BMPs may be reasonable, depending on the location and type of BMP, provided that they are

> consistent with the beneficial uses of the creek and the natural aquatic ecosystem characteristics of the creek".

COMMENT 20.: The CEQA document should describe the reasonably foreseeable alternative in-stream BMPs that are consistent with the beneficial uses and [representative] natural aquatic ecosystems of the creek and describe the impacts of building and operating such BMPs. The City is unaware of any in-stream BMP that would achieve the WLAs and meet these criteria.

COMMENT 21.: Would compliance with the metals and bacteria TMDLs be achieved if storm water discharged from a storm drain outfall exceeds the WLA if that water is treated to meet the WLA further downstream? In other words, does the WLA need to be met in receiving waters immediately below storm drain outfalls or somewhere further down the watershed? If the latter, how much further down?

The City believes that the above statement from the "Discussion Paper" is contrary to other statements that have been made by Regional Board staff with regard to the application of the tributary rule and the resultant need to site BMPs upstream of storm drain outfalls. The City has relied on the following statements for its understanding of this issue:

Email from Julie Chan dated March 10, 2006:

> The tributary rule ascribes to a tributary, on which surface water quality standards have not yet been established, the water quality standards applicable to the downstream receiving water…Since the states are required to adopt water quality standards for tributaries, the San Diego Water Board has taken the approach that standards applicable to the downstream receiving water will be applied to the tributary in the absence of site specific standards. The Basin Plan has a footnote which accomplishes this purpose. The footnote states: "Beneficial uses apply to all tributaries to the indicated water body, if not listed separately".

Email from John Robertus dated May 3, 2006:

> I think that you can resolve the matter by considering that the Basin Plan designates both beneficial uses and water quality objectives by hydraulic units, areas and sub-areas. These apply to all waters of the state within each respective HU, HA and HSA. There are no "upstream, downstream or in-between waters".
>
> As for the reduction of pollutants, the industrial stormwater (including construction) discharges must be reduced to BAT/BCT, the MS4 discharges must be reduced to MEP with allowances for an iterative process, and the TMDL pollutant reductions must be accomplished in accordance with the TMDL Basin Plan amendment which is independent of MEP or BAT/BCT. I believe that the Regional Board could also

require that all water quality objectives be met immediately in receiving waters if it were to choose to do so. However, this is not what is expected at this time.

As for BMPs in waters of the state, you are correct that we do not embrace any BMPs located within waters of the state. Rather, we expect that pollutants will be reduced appropriately prior to the discharge into such waters. In some cases we have allowed projects that have "extended" the MS4 infrastructure to collect, divert or treat such discharges. Some of these are sites of CBI projects and others are just local pilot projects. In each case there was a case-by-case decision. With respect to "treatment wetlands", I can make no case for allowing assimilative capacity of waters of the state to be used as "treatment" to remove pollutants discharged from a MS4. Perhaps some day there will be mixing zones or some other construct, but this does not exist today. There can be treatment wetlands constructed to function as a pollutant reduction method anywhere except in the waters of the state.

Chollas Creek Dissolved Metals TMDL Technical Report (July 25, 2006, page 3)

These loading capacities, which are equal to the Numeric Targets, will apply to the entirety of Chollas Creek and during all times of the year. Regulated **discharges** [emphasis added] from each of the land uses identified in the Source Analysis portion of this TMDL will not be allowed to have dissolved metals concentrations that causes [sic] in-stream waters to exceed the loading capacities.

Chollas Creek Dissolved Metals TMDL Appendix M (July 25, 2006, page 21):

The 2002 List of Water Quality Limited Segments lists the lowest 1.2 miles as the estimated size effected [sic]. To ensure restoration of water quality standards in this portion of the creek, all upstream sources need to meet the Wasteload Allocations of this TMDL. This is consistent with the Diazinon TMDL, adopted in 2002. Wasteload Allocations were applied to **discharges** [emphasis added] throughout the entire watershed when only the lowest 1.2 miles was listed as impaired.

Chollas Creek Dissolved Metals TMDL, Appendix I (July 25, 2006, page 15)

The implementation of these TMDLs will result in improved water quality in Chollas Creek **and it** [sic] **tributaries** and will not have significant adverse effects to the environment (emphasis added).

Bacteria-1 TMDL, Technical Report (August 4, 2006)

Persons whose point source discharges contribute to the exceedance of WQOs for indicator bacteria (as discussed in section 10) will be required to meet the WLAs in their urban runoff before it is discharged from MS4s to receiving waters.

The following statements indicate a strong preference against diverting storm water or urban runoff from receiving waters for treatment, again leading to the unavoidable conclusion that Wasteload Allocations must be met in the receiving waters immediately below storm drain outfalls:

Chollas Creek Dissolved Metals TMDL, Appendix I (July 25, 2006, page 13)

> Since in-stream diversions should not be used as BMPs, there should be no adverse impacts on aesthetics resulting from construction of concrete-lined basins or treatment facilities within the creek.

Bacteria-1 TMDL, Appendix R (August 4, 2006)

> In-creek diversions should not be used as controls, therefore, there should be no adverse effects on aesthetics resulting from construction of concrete-lined basins or treatment facilities within the creeks.

Finally, since the CEQA document does not describe biological impacts of building structural BMPs in canyons or receiving waters, it was presumed that such construction would not be allowed.

COMMENT 22.: In order to provide an adequate project description under CEQA, the metals and bacteria TMDL documentation should be explicit about where the Wasteload Allocations must be met. In order to provide an adequate environmental setting under CEQA, the metals and bacteria TMDL documentation should, at a programmatic level, describe where the MS4/receiving water interface is located. Based on the geography and topography of the watershed, the City has concluded that "Waters of the State" and receiving waters generally extend upstream to locations immediately downstream of storm drain outfalls throughout the watershed.

COMMENT 23.: Insofar as storm water treatment is required (due to the impracticability of widespread infiltration and in order to maintain the hydrology of receiving waters) the CEQA analysis should acknowledge that treatment must occur immediately above storm drain outfalls in order to prevent the regrowth of bacteria in the storm drains which would result in non-compliance with the bacteria TMDL.

C. Size of BMPs and Design Storm

The magnitude of the impact associated with building BMPs to comply with the metals and bacteria TMDLs is based upon the amount of storm water that needs to be treated. To date, the Regional Board has declined to establish a "Design Storm" which would provide direction to the City on the size/capacity of BMPs required. Therefore, the City has relied on language in the California Toxics Rule which states, "Neither the Aquatic Life Chronic Criteria nor the Aquatic Life Acute Criteria can be exceeded more than once every three years (40 CFR 131.38 (c)(2)). For engineering purposes, this translates in the need to ensure that runoff from a maximum three-year storm meets to meet the Wasteload Allocations established for the metals TMDL. The bacteria TMDL is silent on

the appropriate design storm; therefore, the assumptions in Attachment 3 are very conservative . However, this sizing criterion must be augmented by pollutograph data which shows how actual concentrations of metals and bacteria change during storms and during the storm season. Current data suggest that concentrations of dissolved metals increase through storms and over the storm season.

COMMENT 24.: In order to provide an analysis of the impacts associated with building BMPs to address the metals and bacteria TMDL, the Regional Board must begin with a programmatic evaluation of the size of storm that must meet the Wasteload Allocations. What is the maximum storm size that the Regional Board expects to meet the Wasteload Allocations and how is that storm size factored into the Regional Board's analysis of the impacts of building BMPs? As can be seen in the Weston report, the decision on the size of storm that needs to be treated has a significant effect on the magnitude of public works required.

D. Uncertainties Surrounding the TMDL

COMMENT 25.: The City needs to know how exceedences of the TMDL will be evaluated by the Regional Board. Given the above discussion regarding the Tributary Rule, the City is operating under the assumption that a discharge in excess of the Wasteload Allocations at any one of the approximately 800 outfalls in the watershed would warrant a Notice of Violation. The TMDL Technical Report should explicitly state whether a Wasteload Allocation exceedence at any single outfall would warrant a Notice of Violation and, if not, how non-compliance would otherwise be assessed? For example, if monitoring showed concentrations of zinc, copper, or lead in excess of the Wasteload Allocations at 100 outfalls during one storm event would the Board have the basis for issuing 100 Notices of Violation or one Notice of Violation?

COMMENT 26.: The compliance schedule proposed by the Regional Board demands a 50% reduction in exceedences of Wasteload Allocations in Year 7. The City interprets this to mean that either 400 storm drain outfalls must have no exceedences or that none of the 800 outfalls may have exceedences more than 50% of the time (or some combination thereof) by Year 7. Shouldn't the compliance schedule be driven by load reductions rather than the percent reduction in exceedences? Please provide examples how compliance would be assessed.

The City noted in May, 2005 that the TMDL is written such that load reduction of 88.5% for copper, 77.4% for zinc, and 98.7% for lead is required. The City bases this contention on the historical maximum concentrations at the mass loading station. In its response, the Regional Board replied that the City is incorrect and that the "average reduction required is closer to 50%". Since the TMDL uses a concentration-based WLA that applies to all waters of the state in the watershed, applying an average concentration to the required load reduction is not scientifically correct. The historical range of reductions required to meet the WLA, based on mass loading station data, are from 3% to 87% for dissolved copper and from 14% to 92% for dissolved lead. While the reductions

needed in different subwatersheds will vary, it is the City's understanding that the WLAs must be met in receiving waters at any time. To meet the concentration-based WLA reductions of greater than 50 percent would, therefore be needed where these maximum concentrations are observed.

COMMENT 27.: Please clarify how compliance with the TMDL will be measured in terms of percent reduction of dissolved metals. The City's understanding is that an "average 50% reduction" would not result in compliance. Expressing compliance as an average 50% reduction is misleading.

COMMENT 28.: The City believes that the Regional Board has significantly underestimated the cost of implementing the metals TMDL. See Attachment 3 and our previous letter for additional detail. In its discussion paper, Regional Board staff erroneously indicated that the City estimate for compliance is $1 billion for a 50-acre area. The City's estimate was $1 billion for the entire watershed. Please refer to Attachment 3 for more detailed cost estimates.

The California Toxics Rule includes a 10% Margin of Safety (MOS). Regional Board staff proposes to add an additional 10% MOS.

COMMENT 29.: The additional 10% MOS is unnecessary and arbitrary. It is reasonable to assume that the additional load reductions required by this additional MOS will render certain BMPs ineffective in terms of compliance in some portions of the watershed, resulting in the need to build more costly and intensive BMPs. Please describe the need for the additional 10% MOS.

Page 57 of the Chollas Creek Dissolved Metals Technical Report states that the Regional Board's model estimated the potential load of each metal from the open space land use (9.73% of the Chollas Creek watershed, or over 1,583 acres) to be 0% of the total existing load for each metal. Contributions of loading from open space land uses in comparison to other sources were found to be insignificant. Page 59 of the Technical Report and the Regional Board's "Discussion Paper" conclude that Chollas Creek receives significant contributions of copper, lead, and zinc but that this source must travel through the MS4 and thus have already been accounted for [in the WLA for the MS4). The City has recently undertaken an aerial deposition study and interim results are presented in Attachment 4. In general, the amount of aerial deposition in the watershed is significant. Open spaces adjacent to Chollas Creek and its tributaries drain into receiving waters without first entering the MS4. In a future compliance scenario where wet weather flows in the MS4 above storm drain outfalls are diverted for infiltration, the only flows in the creek would be those from the adjacent open spaces. Given that the metals TMDL is concentration-based, this loading could result in non-compliance with the TMDL. The Regional Board's "Discussion Paper" concludes that "a very small percentage of the land area drains directly into Chollas Creek via sheetflow from canyon walls. What is this determination based on?

COMMENT 30.: The City has submitted substantial evidence that concentrations of zinc, lead, and copper in runoff from open space lands will be significant. What is the reasonably foreseeable means for TMDL compliance given that runoff containing aerially deposited pollutants from open space lands that drain directly into receiving waters (never enter the MS4) will exceed the zero WLA for these lands?

## III. CEQA ANALYSIS – SCOPE, DETAIL, AND CUMULATIVE EFFECTS

The City has previously stated that the Regional Board must assess the impacts of building BMPs to comply with the TMDL. As noted above, the Regional Board does apparently concur to some degree with the City's position on this as the Regional Board has considered this impact with respect to aesthetics, air quality, biological resources, and noise. However, as noted in Attachment 1, there are a number of other issue areas that should be addressed because impacts are potentially significant. While the CEQA checklist provides no rationale for why the "no impact" box was checked for these issue areas, Attachment 1 includes substantial evidence that these impacts should be considered significant.

COMMENT 31.: Similar to how the Los Angeles Region revised its CEQA analysis for the Los Angeles River Trash TMDL, the San Diego Regional Board must address all the potentially significant impacts associated with building and maintaining the BMPs needed to comply with the metals and bacteria TMDLs.

In its' Discussion Paper entitled "Adequacy of the Environmental Review Documents for the Chollas Creek Metals TMDLs" (April 6, 2006) Regional Board staff reiterates its' position that it is not obliged to provide any additional level of detail with regard to the impacts associated with building BMPs to comply with the TMDLs. Regional Board staff position is that identifying the specific projects that might be implemented is speculative at this time and that future CEQA documents prepared for specific projects are the responsibility of the City. While the City agrees that it will likely be required to prepare additional CEQA documentation in the future in order to comply with the TMDL, it disagrees that the Regional Board has prepared an adequate analysis of the impacts associated with compliance with the TMDLs

The City believes that the Regional Board has improperly deferred additional environmental analysis. The City believes that the Regional Board has not defined the TMDLs with enough specificity to conduct a "programmatic" level of analysis of the reasonably foreseeable means of compliance, particularly with respect to required load reductions (which dictate the types of BMPs required), the tributary rule, and prohibitions on in-stream diversions (which dictate the possible locations of the BMPs), and failure to develop a design storm (which leaves open the acreage requirements of the BMPs). In accordance with Section 15187of the State CEQA Guidelines this analysis could utilize numeric ranges and averages when specific data is not available. Section 15146 of the CEQ Guidelines addresses the level of specificity that is required for projects such as the TMDLs. For CEQA purposes, adoption of the TMDLs by the Regional Board is

comparable to adoption of a General Plan or Community Plan by a jurisdiction's legislative body with land use powers. What is required is the production of information sufficient to understand the environmental impacts of the proposed project. The current analysis does not fulfill this requirement. The City further believes that unless mitigation to reduce potentially significant impacts to a level below significance is "guaranteed", the analysis must conclude that the impacts are significant (CEQA Guidelines, Section 15152(f)(3). In that case, "Findings" and a "Statement of Overriding Considerations" must be adopted.

COMMENT 32.: The Regional Board should conduct a programmatic level of environmental analysis for the metals and bacteria TMDLs instead of deferring further analysis to the City. Issues that should be addressed are described in Attachment 1 and should also include impacts to public lands if the Regional Board believes that it is reasonably foreseeable for storm water to be pumped to public lands for infiltration as described in Attachment 3.

COMMENT 33.: The CEQA analysis must draw conclusions regarding the "significance" of the impacts evaluated, not just whether they are "adverse".

COMMENT 34.: To the extent that the CEQA analysis indicates that "[i]mpacts **may** be mitigated (e.g., Chollas Creek Dissolved Metals TMDL, Appendix I, pages 13 and 15, emphasis added) and not that they **will** be mitigated, the analysis should conclude that the impacts are significant. See also page 6 of the Regional Board's "Discussion Paper" which indicates that it is not clear whether impacts to aesthetics would be mitigated.

COMMENT 35.: Please resolve the apparent inconsistency between the following adjacent sentences in the Chollas Creek Dissolved Metals TMDL, Appendix I (July 25, 2006, page 15):

> The implementation of these TMDLs will result in improved water quality in Chollas Creek and it [sic] tributaries and will not have significant adverse impacts to the environment. Specific projects employed to implement these TMDLs may have significant impacts, but these impacts are expected to be limited, short-term, or may be mitigated through design and scheduling.

The second sentence referenced appears to indicate that certain impacts, although they may be limited or short-term, will be significant. Which impacts are significant?

COMMENT 36.: If it finds certain impacts to be significant, does the Regional Board intend to adopt "Findings" and a "Statement of Overriding Considerations" for either the metals or bacteria TMDL?

COMMENT 37.: Why is the use of tiering treated differently in the Bact-1 CEQA Checklist (page R-13) than in the "Adequacy of the Environmental Review Documents for the Chollas Creek Metals TMDLs" Discussion Paper dated April 6, 2006?

COMMENT 38.: CEQA requires a discussion of project alternatives if the proposed project would result in potentially significant impacts, and the State Water Resources Board regulations (23 C.C.R. § 3777(a)(2) also requires the Regional Board's substitute documents to contain "reasonable alternatives to the proposed activity." Why does the CEQA analysis for the metals TMDL not include a discussion of project alternatives given that the CEQA analysis for the bacteria TMDL does include the discussion?

COMMENT 39.: If the Regional Board includes a discussion of project alternatives in the metals TMDL, it should use the implementation protocol described as the City's preferred alternative in Attachment 3.

With the exception of a checkmark in the "no" box, the CEQA analysis is silent on cumulative impacts. The bacteria TMDL should be integrated with the metals TMDL for purposes of environmental analysis. To the extent that the watershed is listed as impaired for other pollutants, implementing BMPs for these future TMDLs should also be considered. In addition, the City believes that the watershed could also be listed for pyrethroids, so implementing BMPs for that pollutant should also be considered. Finally, the CEQA analysis should also include an evaluation of TMDL-related impacts in the context of City plans and policies for the watershed.

COMMENT 40.: The CEQA analysis needs to address all reasonably foreseeable future TMDLs for the Chollas Creek watershed in conjunction with the metals TMDL because the City must address all TMDLs in an integrated fashion. It is not reasonable to expect that the City will build BMPs to address the metals TMDL and then a second, separate set of BMPs to address the bacteria or other future TMDLs. The need to address both TMDLs affects the types of BMP that will lead to compliance and the location of the BMPs. The CEQA analysis should also incorporate City of San Diego plans and policies into its evaluation.

Page 6 of the Regional Board's "Discussion Paper" indicates that implementation of TMDLs in Chollas Creek will not result in adverse cumulative impacts to Chollas Creek, in part due to the fact that the Chollas Creek MS4 dischargers are already required to implement BMPs.

COMMENT 41.: The Regional Board's CEQA analysis should base its impact analysis on the delta between existing conditions on the ground and future conditions. It is not appropriate to reduce the delta by establishing as the existing conditions baseline an imaginary situation.

COMMENT 42.: Paragraph 19 of Appendix J, the proposed resolution, contains a section that purports to be a statement of overriding considerations required by CEQA when a project may have a significant, unmitigated impact to the environment. Appendix I does not identify any significant, unmitigated impacts. Why does the resolution contain

a statement of overriding considerations if the CEQA analysis does not identify a significant, unmitigated impact?